BLANK
PAGE

APPENDIX A

[*United States District Court, Northern District of Oklahoma*]

MEMORANDUM

The Court has for decision here the question of whether sanctions for civil contempt can be imposed against the plaintiff, Hyde Construction Co., and its attorney Vardaman S. Dunn.

Obtaining jurisdiction by attachment, plaintiff instituted this action in a United States District Court in Mississippi to recover a money judgment for breach of contract and for a declaratory judgment and injunction. The case has been transferred to this Court.

Plaintiff then brought suit in a Mississippi state court against the same defendant on the same cause of action and obtained jurisdiction by attachment.

Dalrymple Equipment Company was the resident attachment defendant in both actions.

A temporary restraining order was issued in this case restraining the parties from proceeding in the state court action. Hyde and its attorneys had notice of it. It and they proceeded with the state court trial over a period of some fifteen days and concluded the trial on March 26, 1964. During that period of time the restraining order was in force, and this Court had issued and served on Hyde and its attorneys an order to show cause why they should not be found in contempt.

On March 14th, the Court entered its findings that Hyde and its attorneys, Vardaman S. Dunn and Charles Clark, were in contempt, and took under advisement the matter of imposing sanctions. On April 9, 1964, Charles Clark was purged of civil contempt.

On March 27, 1964, this Court denied Koehring's application for preliminary injunction and the temporary restraining order as extended, expired by lapse of time.

A hearing has been held concerning the sanctions, if any, to be imposed for the civil contempt.

Hyde urges that upon denial of the application for a preliminary injunction all matters relating to civil contempt were terminated. Salvage Process Co. v. Acme Tank Cleaning Corp., 1936, 2 Cir. 86 F. 2d 727; Worden v. Searls, 1886, 121 U. S. 14, 30 L. Ed. 853; U. S. v. United Mine Workers, 1946, 330 U.S. 258, 294-5, 91 L. Ed. 884, 913.

In the last cited case, the Court's remarks as to obligation for compliance (p. 294) indicate that expiration of an order is not equivalent to reversal; the temporary restraining order and preliminary injunction there involved were sustained, not reversed and the language at pp. 294-5 as to the effect of reversal appears to be obiter dicta. In the other cases cited, the "basic action" was for injunctive relief, the preliminary injunction awarded some of that relief, and plaintiff lost its case on the merits. The contempt order thus was reversed upon and as a part of the adjudication in the basic action that plaintiff had no rights which were violated. See 121 U. S. at p. 25 and 86 F. 2d 725.

In the case at bar the temporary restraining order does not touch the merits. It was wholly ancillary and was designed to halt prosecution of the state court action at least until further inquiry could be made. It has not been set aside or reversed. The order denying the preliminary injunction did not affect it nor constitute a determination that it was improvidently entered. On the contrary, the findings and conclusions are that it was properly entered.

A major reason for denial of the temporary injunction was that the acts sought to be enjoined had already been committed. The authorities cited do not sustain the contention made. Compare Brougham v. Oceanic Steam Navigation Co., 1913, 2 Cir., 205 F. 857; Land v. Dollar, 1951, D.C. Cir., 190 F. 2d 366, cert. dismissed 344 U. S. 806, 97 L. Ed. 628; Blackwelder v. Crooks, D. C., D. C. 1957, 151 F. Supp. 26, 28, affirmed in part and reversed in part, 252 F. 2d 854; Cummings-Landau Machinery Co. v. Koplin, Ill. 1944, 54 N. E. 2d 462. These cases may not be precisely in point. Indeed, it may be that here is a case of first impression.

The verified petition for order to show cause and the order to show cause are a sufficient basis for this proceeding. The parties charged have filed no answer or other pleading denying nor have they otherwise denied violation of the temporary restraining order. The proof of violation is complete and sufficient. There is no fatal defect in the procedural aspects of the case. U. S. v. United Mine Workers of America, supra, 330 U.S. 258, 295-8, 91 L. Ed. 884, 914-15; National Labor Relations Board v. Tupelo Garment Co., 1941, 5 Cir., 122 F. 2d 603.

The respondents have elected to test the order by disobeying it. The law is clear as to the consequences of that course of action. The Court may impose sanctions to deprive the contemnors of the fruits of their contemptuous conduct, to restore the status quo as nearly as may be, to coerce obedience and to compensate the opposite party for loss caused by disobedience. "The measure of the court's power * * * is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 1949, 336 U. S. 187, 193, 93 L. Ed. 599, 605. And see: Deeds v. Gilmer, 1934, Va., 174 S. E. 37; Keys v. Alligood, 1919, N. C., 100 S. E., 113; Parker v. U. S.,

1946, 1st Cir., 153 F. 2d, 66; U. S. v. Onan, 1951, 8 Cir., 190 F. 2d 1; Leman v. Krentler-Arnold Hinge Last Co., 1931, 284 U. S. 448, 76 L. Ed. 389; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U. S. 399, 67 L. Ed. 719.

It is made to appear to this court that a Mississippi state court has enjoined Koehring Company from proceeding to trial of this case in this Court. Aside from evidence thereof, this and other Federal Courts may take judicial notice of such a proceeding. Wagner v. Fawcett Publications, 1962, 7 Cir., 307 F. 2nd 409. No decision concerning that injunction is here made, but Donovan v. Dallas, decided June 8, 1964, 377 U. S. 408, 12 L. Ed. 2d (Adv. Sheets) 409 is of interest. The conflict between courts has been brought about by events originating in respondents disobedience of the temporary restraining order of this court. It is hoped that there may be an orderly resolution of that conflict.

An order will be entered in accordance with the views expressed in this memorandum.

Allen E. Barrow
U. S. District Judge
Northern District of Oklahoma

Filed Sept. 1, 1964

JUDGMENT AND ORDER

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining

order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred

reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed Sept. 1, 1964

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

July Term 1965

HYDE CONSTRUCTION COMPANY, INC., Appellant,
vs.
KOEHRING COMPANY, Appellee.
No. 7929

VARDAMAN S. DUNN, Appellant,
vs.
KOEHRING COMPANY, Appellee.
No. 7930

Appeals from the United States District Court for the Northern District of Oklahoma

Charles Clark and David H. Sanders for Appellants.

William A. Denny and Maurice McSweeney (A. Morgan Brian, Jr. and Villard Martin, Jr., Of Counsel, were with them on the brief) for Appellee.

Before PICKETT, LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

These appeals are taken from an order and decree[1] entered by the United States District Court for the Northern District of Oklahoma springing from a finding that appellants were in civil contempt for disregarding a temporary restraining order issued by the court. The restraining order had been directed to "Hyde Construction Company, Inc., its attorneys, agents, and all persons acting in concert therewith" and required them to cease and desist from proceeding with a civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The appellant Dunn is a member of the bar of Mississippi and attorney for Hyde Construction Company. It is not disputed that appellants did disregard the court's order and, through the expedient of over-simplification, we state the present appellate issue to be a determination of the validity of the restraining order.

Appellant Hyde Construction Company was prime contractor on a construction project concerning the erec-

---

[1] "Now on this 1st day of September, 1964, It Is Ordered, Adjudged and Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so re-

tion of the Keystone Dam Spillway in the State of Oklahoma. It contracted with appellee Koehring Company for the latter to design and install a concrete plant for Hyde's use in the project. A dispute between the parties arose in reference to the performance of this contract, and on August 30, 1961 Hyde filed suit against Koehring in the Federal District Court for the Southern District of Mississippi, praying for writs of chancery attachment, injunctive relief, a declaratory judgment, and a money judgment of $500,000 for breach of the contract. Koehring contested the jurisdiction of that court, and in the alternative moved for a transfer of venue to the Federal District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. §1404(a). Apparently unsure of the jurisdiction of the Mississippi federal court, Hyde on September 27, 1961 filed suit in the state chancery court on the same breach of contract action, obtaining jurisdiction by virtue of chancery attachments upon debt-

---

[1](Continued)

strained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in

ors of Koehring.[2] The suit was not actively prosecuted at that time pending the disposition of Koehring's contentions before the Mississippi federal court.

In July of 1962 the Mississippi federal court denied Koehring's motions for transfer but certified the ruling for interlocutory appeal under 28 U.S.C. §1292(b) to the United States Court of Appeals for the Fifth Circuit. On September 19, 1963 the Fifth Circuit reversed the federal district court on the venue question and remanded the case to the district court for transfer to the Oklahoma federal court under 28 U.S.C. §§1404(a) and 1406(a). Koehring Co. v. Hyde Construction Co., 324 F. 295. Hyde then petitioned the Fifth Circuit for rehearing, which stayed the order until that petition was denied on February 5, 1964. During this period the state court action was progressing toward trial, March 9, 1964 being set as a tentative date. On December 30, 1963, just prior to the Fifth Circuit decision on Hyde's petition for rehearing, Koehring petitioned that court to enjoin the state suit, which the Fifth Circuit on January 27, 1964 refused to do, without prejudice to Koehring's right to apply to the Oklahoma federal court for such relief.

---

[1](Continued)

favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate."

[2]At the time these suits were commenced, Rule 4(e) Fed. R. Civ. P., had not yet been amended to permit the initiation of federal court actions through use of state attachment procedures. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 4, Fed. R. Civ. P. (Supp. 1964).

Hyde then filed in the Mississippi federal district court, on remand, a motion to consider changed circumstances and not transfer the case to Oklahoma; in the alternative, Hyde sought voluntary dismissal of that action in accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure. Up to this time Koehring had not yet filed an answer on the merits but did so on February 20 pending the decision. On February 24, 1964, the Mississippi federal district court denied Hyde's motion in reference to the transfer issue but granted the motion for voluntary dismissal without prejudice, reasoning that the case had not yet been transferred to Oklahoma and that Rule 41(a)(1) allowed dismissal upon plaintiff's motion at any time before the filing of an answer.

On March 6, 1964 Koehring obtained ex parte from the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court suit pending determination of a writ of mandamus which had been filed by Koehring in the Fifth Circuit on March 4, petitioning that court of appeals to direct the Mississippi federal court to vacate its decision dismissing the action. The mandamus application was heard on March 10, and on that same afternoon the Fifth Circuit rendered its decision in Koehring's favor, vacating the Mississippi federal court's decision dismissing the action[3] and ordering the Mississippi federal judge to transfer the action. The order further stated that:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma,

[3]Appellants urge us to redecide the question of Hyde's right to dismissal, contending that this court is not bound by the Fifth Circuit determination. We see no necessity for inquiry into such issue for it is only the fact of the decision that is pertinent to our present determination.

this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (Emphasis supplied.)

The order was concluded by the Fifth Circuit's vacating its temporary restraining order against Hyde's proceeding in the state court action because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court." Meanwhile, trial in the state court action had been set for the next day, March 11, at 2:00 p.m.

At 9:45 a.m. the next day, March 11, counsel for Koehring presented to the Oklahoma federal court a certified copy of the Fifth Circuit's order together with a motion for an injunction and a temporary restraining order forbidding further proceedings in the state court suit, which was to begin trial later that same day. Both Hyde and Koehring were represented by counsel before the Oklahoma court and argued the merits of the injunction and restraining order, and just before 2:00 p.m., when the Mississippi trial was to begin, the temporary restraining order was granted to preserve existing conditions pending a decision on the jurisdiction of the Oklahoma federal court and the propriety of Koehring's motion for an injunction.[4] The news of this order reached Hyde's attorneys in Mississippi, including appellant Dunn, that same afternoon but they declined to obey it and continued on with the trial of the suit[5] until its conclusion on about March 25, when Hyde was awarded a judgment of over $486,000.

---

[4]Koehring's motion for a "preliminary" injunction staying Hyde from proceeding in Mississippi was ultimately denied on April 9, 1964 after a full hearing. Among the reasons given by the court for denying the injunction was that "the state court trial has now been completed and therefore much of the initial problem and urgency for Koehring is now moot."

[5]The Mississippi state court on March 12 ordered the state trial to proceed.

On March 12 Koehring petitioned the court below to cite Hyde and Dunn for contempt; the court issued an order to Hyde and its attorneys to show cause on March 14 why they should not be found in contempt. At the hearing Hyde's counsel appeared but briefly and Dunn did not appear at all, but the court nevertheless entered findings and held Hyde and Dunn in civil contempt.[6] Thereafter, on September 1, 1964, the court entered the judgment noted (Note 1, supra) and from which this appeal is taken.[7]

At the outset we are faced with the question of our own jurisdiction to review the September 1 order. Normally, a judgment for civil contempt against a party is not reviewable on appeal from that judgment but only on appeal from a final judgment in the related action. Fox v. Capital Co., 299 U.S. 105; Duell v. Duell, D.C. Cir., 178 F_2 683, 687; Taylor v. Bowles, 9 Cir., 152 F_2 311. However, a judgment for civil contempt against a non-party, such as Dunn, can support an appeal without dependence upon the related action if the judgment of contempt is, itself, final. Bessette v. W. B. Conkey Co., 194 U.S. 324; In re Manufacturers Trading Corp., 6 Cir., 194 F_2 948; Fenton v. Welling, 9 Cir. 139 F_2 608; 6 Moore's Federal Practice, ¶ 54.17 at p. 154. And

---

[6]Appellant Dunn was also found to be in criminal contempt and a warrant of arrest issued March 14. The Mississippi state court issued an order purporting to restrain any U.S. Marshal from making the arrest until the state trial, then in progress, was completed. The arrest was made on March 16 and Dunn was immediately released from restraint by writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. This action is now pending upon appeal as No. 22081 in the Fifth Circuit.

[7]The court's order is clear to the effect that the injunction preventing collection of the Mississippi judgment is wholly dependent upon the findings and conclusions relative to the contempt judgment and must stand or fall with it.

here the problem is compounded by the question of whether a final judgment of contempt has ever been entered since the district court reserved its decision as to whether appellants will be required to pay further sums. However, 28 U.S.C. §1292(a)(1) gives jurisdiction to courts of appeals on appeals from interlocutory orders of the district courts "granting * * * refusing or dissolving injunctions * * *," and in this case the district court enjoined appellants from enforcing the state court judgment. Since the injunction is inseparable from the contempt orders, whose validity in turn depends upon the jurisdiction of the lower court, this court may and will review the entire order of September 1, 1964. Cf. Stewart-Warner Corp. v. Westinghouse Electric Corp., 2 Cir., 325 F. 822, cert. denied, 376 U.S. 944.

As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. §2283.[8] Initially, Koehring claims that the contempt rulings were correct regardless of whether the district court had jurisdiction over the parties and over the subject matter under the doctrine that a court has jurisdiction to determine its own jurisdiction except in cases of "plain usurpation" clearly not here applicable. Since a court has such jurisdiction, it has power to punish for violations of orders entered pursuant to it. Therefore, argues Koehring, the contempt orders must be affirmed regardless of the court's ultimate jurisdiction over the case.

---

[8]Section 2283.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This position of Koehring overlooks the fact that it was civil contempt for which Hyde and Dunn were cited. While a court has the power to punish for criminal contempt for actions that are an affront to its dignity, even if the violation was of an order that was incorrectly entered, civil contempt is remedial and accrues to the benefit of the opposing party who has no claim to reimbursement for offenses solely against the court. As the Court stated in United States v. United Mine Workers, 330 U.S. 258, 295, respecting civil contempt: "The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." And see Heasley v. United States, 8 Cir., 312 F. 641, 648-49; Cliett v. Hammonds, 5 Cir., 305 F. 565, 570. Thus, the correctness of the contempt orders is dependent upon the jurisdiction of the district court, and the contempt orders must fall if that court's actions were beyond its statutory power.

The only method by which the district court could have acquired jurisdiction below was by way of transfer of the action originally filed in the Mississippi federal court. And since the Mississippi court did not transfer the papers until March 16, subsequent to the entering of the subject restraining order, the court below did not obtain jurisdiction prior to March 16, under normal procedures, since the transfer of the papers, etc., to the transferee court is considered essential to that court's acquiring jurisdiction. See, *e.g.,* Drabnik v. Murphy, 2 Cir., 246 F. 408; Wright on Federal Courts, p. 143. The court below, therefore could obtain jurisdiction only if the Fifth Circuit's order, by itself, constituted a transfer, which that court clearly did intend it to be. But the transfer statutes, 28 U.S.C. §§ 1404 and 1406, both specify

that only the "district court" may transfer, and it is basic that the appellate jurisdiction of all inferior federal courts is wholly dependent upon statute. Carroll v. United States, 354 U.S. 394. Koehring, not disputing these general principles, nevertheless argues that the Fifth Circuit had the power to "constitute" its order a transfer by virtue of 28 U.S.C. § 1651, the "All-Writs" statute authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It is not apparent which particular "writ"[9] was issued by that court nor that the order was necessary or appropriate in aid of its own jurisdiction or judgment. But it is clear that the Fifth Circuit was attempting to accomplish something it normally would be powerless to do, for a transfer must, according to statute, be made by the district court, *and* it is not effective until the papers have been transferred. The Supreme Court recently stated that "extraordinary writs are 'reserved for really extraordinary causes,' * * * and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245. Section 1651 "does not contain a new grant of judicial power," United States *ex rel.* Wisconsin v. First Fed. Sav. & Loan Ass'n, 7 Cir., 248 F. 804, 809;

---

[9]The Fifth Circuit order was a writ of mandamus specifically directed to the district judge and clerk except as to that portion of the order which stated the order to be self-executing. The function of the district court in obeying a mandate of the Court of Appeals is, of course, ministerial. Bastian v. Erickson, 10 Cir., 114 F. 338. The Mississippi district court did not *refuse* to obey the original mandate of transfer ordered by the court of appeals but affirmatively indicated his willingness to do so. His action in granting Hyde's motion to dismiss the case instead of effectuating the original mandate for transfer to Oklahoma was, as the Fifth Circuit specifically held, no more than error. The district court promptly obeyed the writ of mandamus.

cf. Huddleston v. Dwyer, 10 Cir., 145 F. 311, 315. With all deference, we hold that the Fifth Circuit was powerless to "constitute" one of its orders a transfer and that the Oklahoma district court did not obtain jurisdiction by virtue of such order. It follows that the district court had no jurisdiction to issue its original restraining order nor to punish appellants for not complying with the order.

The injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with this opinion. Other contentions made on these appeals are either not properly before this court or are found to be without merit.

APPENDIX C

[*United States Court of Appeals, Tenth Circuit*]

JUDGMENT

Seventh Day, July Term, Wednesday, July 21st, 1965

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with the opinion of the court. Other contentions made on these appeals are either not properly before this court or are found to be without merit. It is further ordered that Hyde Construction Company, Inc., and Vardaman S. Dunn, appellants, have and recover of and from Koehring Company, appellee, their costs herein and have execution therefor.

APPENDIX D

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 7929

HYDE CONSTRUCTION COMPANY, INC.,

Appellant,

vs.

KOEHRING COMPANY,

Appellee

No. 7930

VARDAMAN S. DUNN,

Appellant,

vs.

KOEHRING COMPANY,

Appellee.

APPELLEE'S PETITION FOR REHEARING

The Appellee, Koehring Company, a corporation, presents this Petition for Rehearing in the above entitled matter, and in support of this Petition respectfully shows to the Court:

On July 21, 1965, this Court entered its opinion vacating the injunction and contempt judgments and remanding for further proceedings. The opinion holds that only a district court may transfer a cause of action, that it is not transferred until the court papers are physically conveyed, that the Court of Appeals for the Fifth Circuit did not have the power to transfer a cause of action by its own order, and that therefore the Lower Court did

not have jurisdiction when it issued the temporary restraining order on March 11, 1964. A reading of the opinion indicates that the Appellee may have failed to make clear its contention that the Lower Court did have jurisdiction over the parties who appeared before it, made general appearances and fully participated in oral argument.

I.

THE FIFTH CIRCUIT SHOULD BE OVERRULED ONLY IF THERE WERE EXTRAORDINARY CIRCUMSTANCES DEMANDING IT. NO SUCH CIRCUMSTANCES WERE PRESENT HERE.

There are no extraordinary circumstances in this case which require that the decision of the Fifth Circuit be overruled. It is clearly the rule that, absent extraordinary circumstances, the prior decision of a court of coordinate jurisdiction should not be overruled by a district court. *Prack v. Weissinger,* 276 F2d 446, 450 (4th Cir. 1960); *U. S. v. Wheeler,* 256 F2d 745 (3rd Cir. 1958). That reasoning is directly analogous to the present fact situation.

There are in fact some extraordinary circumstances present in this case, but those circumstances strenuously demand that the Fifth Circuit's decision be accepted and honored by this Court, even if this Court does not fully agree with its action.

On March 6, 1964, the Fifth Circuit issued an injunction restraining the parties from proceeding with the state court action in order to protect Koehring's rights .R. 138ss) On March 10, 1964, the Fifth Circuit transferred the case and ordered the Mississippi Federal District

Court to mail the record to the Federal District Court for the Northern District of Oklahoma. (R. 25) [For the convenience of the Court the orders of March 6 and 10 have been printed herein as exhibits A and B respectively.] But, knowing that the record would not arrive in Oklahoma before the Mississippi State Court case began the next day, the Fifth Circuit also stated:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (R. 25)

Then, considering that jurisdiction had been effectively transferred to the Northern District of Oklahoma, the Fifth Circuit dissolved its injunction against further proceedings in the state court action. The Court specifically stated:

> "The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated." (R. 25)

By this order, the Fifth Circuit ceased its protection of the parties, assuming that the Northern District of Oklahoma would immediately accept jurisdiction and continue the protection of the parties. The Northern District of Oklahoma did accept that jurisdiction, the parties generally appeared before it, motions were made by both parties, and orders were issued by the Court. This Court's ruling that no jurisdiction existed in the Northern District of Oklahoma until the papers physi-

cally arrived on March 16, coupled with the Fifth Circuit's determination that its jurisdiction had ended on March 10, has created a jurisdictional limbo.

Appellee obviously cannot obtain any effective relief from the Fifth Circuit at this date, even if the Fifth Circuit were willing to change its ruling and accept this Court's ruling as to the time of transfer. The result would be, if this decision stands, that Appellee, caught between conflicting circuits, has been denied a court to whom it can turn for protection.

II.

THE COURT'S RULING THAT §1651 DOES NOT AUTHORIZE INSTANTER TRANSFER IF JUSTICE SO REQUIRES IS INCONSISTENT WITH ITS OWN PRIOR DECISIONS.

The Tenth Circuit has clearly decided that a circuit court itself has the power and duty to order the transfer of an action from one judge to another within the same district under authority of "the all-writ statute or in the exercise of inherent powers of appellate jurisdiction to effectuate ... . the manifest ends of justice." *United States v. Ritter*, 273 F2d 30 (10th Cir. 1959). The *Ritter* case has been approved by the Ninth Circuit. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F2d 804 (9th Cir. 1963). That court also cited 28 USC §2106.

While *Ritter* involves an intra district transfer, there is no essential difference between the *power* of an appellate court to transfer an action from one district to another and the *power* to transfer from one judge to another within a district.

28 USC §1404 does not limit this power. It merely authorizes a district court to do that which an appellate court could have done under §1651 or through its inherent powers of appellate jurisdiction.

Here, on March 10, 1964 the Court of Appeals for the Fifth Circuit formally declared on the record that the action was transferred as of that date to the Northern District of Oklahoma. (R. 25) Nothing remained to be done by the District Court in Mississippi but perform the ministerial act of physically mailing the record. The transfer had already been effected.

The Tenth Circuit has held that the function of a district court in obeying a mandate is purely ministerial. *Bastian v. Erickson,* 114 F2d 338 (10th Cir. 1940). Thus, it has already been recognized by this Court that it is effectively the order of the *appellate* and not the district court which is carried out upon a mandate.

III.

DRABIK V. MURPHY DOES NOT HOLD THAT PHYSICAL POSSESSION OF THE COURT PAPERS IS NECESSARY TO ACQUIRE JURISDICTION.

The court in *Drabik v. Murphy,* 246 F2d 408 (2nd Cir. 1957), cited in the opinion of this Court, simply held that once the court papers have arrived in the transferee court, the transferring court no longer has jurisdiction. It said nothing about, nor does it intimate, that jurisdiction *cannot* be acquired prior to physical receipt of the court papers where the transferring court has expressly ordered that receipt not be necessary.

IV.

28 U. S. C. §§1404(a) and 1406 DO NOT RESTRICT THE TRANSFER POWER TO DISTRICT COURTS.

The Court's conclusion that *only* the Lower Federal Court in Mississippi — not the Fifth Circuit too — had the power to order [and *de jure* effect] a valid transfer is predicated on an unjustified and improper statutory interpretation. In its opinion, this Court states that "the transfer statutes, 28 U.S.C. §§1404 and 1406, both specify that *only* the 'district court' may transfer" (p. 13, emphasis added). Yet the exclusive term, "only", is not used at all in those statutes. Section 1404(a), for example, merely provides that "a district court may transfer", nothing else. It does *not* say, nor even imply, that *only* a district court may transfer, or that appellate courts may *not* also transfer. These transfer statutes do not purport to have anything at all to do with the power and authority of federal appellate courts, [much less with their power and authority to effect the *substance* of a transfer, especially when it is collateral] to implement one or more of their statutorily authorized extraordinary writs in a compelling situation (like this one) where justice for the moving party can be served only by meeting the extreme urgency and close timing of the exigencies presented.

Clearly, therefore, the Court has interpreted the statute narrowly. Yet narrow construction of Section 1404(a) should not be applied. It is a remedial statute, *Ex Parte Collett,* 337 U.S. 55, 71 (1949), and should be broadly interpreted.

V.

THE RECORD IN THIS CASE SHOWS THAT APPELLANTS DISOBEYED AN ORDER OF THE LOWER COURT ISSUED AFTER PHYSICAL RECEIPT OF THE CASE FILE.

On March 16, 1964, the record physically arrived in the Northern District of Oklahoma. Shortly thereafter, on March 20, 1964, the Lower Court held a full hearing on the motion for an injunction and extended the Temporary Restraining Order for a period of six days. (R. 54). Even if this Court continues to hold that the Lower Court did not have jurisdiction until the papers were physically transferred, there can be no doubt that the Northern District of Oklahoma had jurisdiction when it issued its order on March 20, 1964. Appellants continued to violate the order thereafter, as set forth in the Lower Court's findings on April 9, 1964. (R. 60-61).

Since the record is clear that the Lower Court had jurisdiction when it issued its order of March 20, and since disobedience continued thereafter, there can be no doubt that the Appellants here violated an order of a Court fully possessed of jurisdiction.

CONCLUSION

For the foregoing reasons Appellee's Petition for Rehearing and reargument should be granted.

Further, in view of the conflict between this Court and the Court of Appeals for the Fifth Circuit, the Court may wish to have rehearing and reargument before the Court en banc.

Respectfully submitted,

A. MORGAN BRIAN, JR.
Hibernia Bank Bldg.
New Orleans, La.

WILLIAM A. DENNY
1701 W. Wisconsin Ave.
Milwaukee, Wisconsin
Attorneys for Appellee

Of Counsel:

VILLARD MARTIN, JR.
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

MAURICE J. McSWEENEY
1500 First Wisconsin Bank Bldg.
Milwaukee, Wisconsin

CERTIFICATE OF COUNSEL

Appellee, by its attorneys, hereby certifies that the foregoing Petition for Rehearing is not presented for the purpose of vexation and delay, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

WILLIAM A. DENNY
Attorney for Appellee

EXHIBIT A

[U. S. Court of Appeals, FILED, Mar. 6, 1964,
Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY),
Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondents

NO. 19819

KOEHRING COMPANY, ET AL.,
Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion

September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."

On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P. 41 (a) (1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a) (b) (c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY),
Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondents

NO. 19819

KOEHRING COMPANY, ET AL.,
Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order re-

straining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order of transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and or-

ders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no

longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown
JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE

March 10, 1964

APPENDIX E

Order denying appellee's petition for rehearing Second Day, August Term, Tuesday, August 17th, 1965.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the petition of appellees for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX F

By order of August 24, 1965, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19819

KOEHRING COMPANY, ET AL.,
Appellants,

versus

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 19, 1963.)

Before CAMERON, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns the transfer of a cause to another district, under 28 U.S.C.A. 1404(a).

Hyde Construction Company, a Mississippi company, brought suit in a federal district court in Mississippi against Koehring Company, a Wisconsin corporation, and C. S. Johnson Company, a division of Koehring. Hyde alleged that Koehring agreed to construct a concrete cooling and mixing plant at the job site of a spillway at Keystone Dam on the Arkansas River in Oklahoma, and that the plant, as built, did not meet

the minimum operational standards agreed on in the contract between the parties. Koehring moved to dismiss on the ground that the court lacked jurisdiction since it was not "doing business" in Mississippi within the meaning of that state's statutes. Alternatively, it asked the district judge to transfer the cause to the Northern District of Oklahoma, where the alleged breach of contract took place and where its own action against the plaintiff was then pending. The trial judge denied both motions.

We do not reach the jurisdictional question for we hold that the case should be transferred under 28 U.S.C.A. 1404(a) to the Northern District of Oklahoma.

I.

Section 1404(a), Title 28 U.S.C.A., states the criteria to be considered in a motion for change of venue:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

These criteria have been spelled out in *Gulf Oil Corp. v. Gilbert,* 1947, 330 U. S. 501, 67 S.Ct. 839, 91 L. Ed. 1055. In that case the Supreme Court said:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . ."

Advantage and convenience to the litigants themselves are not the only important considerations, however. The Supreme Court went on to point out that

> "factors of public interest also have place in applying the doctrine. Administrative difficulties follow for court when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not too be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, though, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

Many of the elements mentioned in *Gulf Oil* as important are present here. The concrete cooling and mixing plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma; if, in view of the complexity of its operation, an on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or near the plant site, and the records of the U. S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa. Moreover, the docket in the Southern District of Mississippi is extremely congested, while that of the federal district court in the Northern District of Oklahoma is relatively current. Thus, every factor points to Oklahoma as the most logical forum for this action, where-

as the only connection which Mississippi has with this case is that one party to this suit resides there.

This case is similar to *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*, 7 Cir. 1955, 220 F.2d 299. There the court pointed out that if "convenience of the parties" were the sole criterion, the refusal of the trial judge to transfer under Section 1404(a) could be sustained, since the plaintiff did in fact live in the district where suit was brought. There were, however, other statutory criteria to be considered. The Court stated:

> "As to the second test, 'convenience of witnesses,' it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from Des Moines, the two cities where the trial might be held.... There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago."

The Seventh Circuit then went on to discuss the "interest of justice", which it felt should be given paramount consideration: "In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred." The Court concluded that in these circumstances it was warranted in ordering the cause transferred to the proper forum. The same factors obtain here, and we have reached the same conclusion.

II.

The Supreme Court in the recent case of *Goldlawr, Inc. v. Heiman,* 1962, 369 U.S. 463, 82 S.Ct. 913, 8 L. Ed. 2d 39 has held that a court may transfer an action under 28 U.S.C.A. 1406(a) even though it lacks jurisdiction over the person. That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Construing this statute, the Supreme Court stated:

> "The language of §1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of §1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized at 'time-consuming and justice-defeating technicalities.' It would at least partially frustrate

this enlightened congressional objective to import ambiguities into §1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired."

The same considerations of convenience and procedural reform which prompted the enactment of Section 1406(a) apply to Section 1404(a), and there is no basis for distinguishing between them insofar as the rule enunciated in *Goldlawr* is concerned. See 1 Moore, Federal Practice para. o.146[5] at 1097 (2d Ed. 1951); 61 Mich. L. Rev. 393 (1962); 1963 Duke L. J. 168. Thus, whether or not the trial court below had personal jurisdiction over the defendant, for "the convenience of parties and witnesses" and "in the interest of justice" the cause should be transferred to Oklahoma.

The cause is REMANDED with instructions that it be transferred to the Northern District of Oklahoma.

APPENDIX H

[U. S. Court of Appeals, FILED, Mar. 6, 1964, Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC. and HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."